initial sequence of digits.[19] Similarly, the out-of-band signaling demanded by DOJ/FBI would include signaling related to information services, which are exempt from the requirements of section 103. *See* 47 U.S.C. § 1002(b)(2)(A). A signal to a telephone indicating that the subscriber has voice mail, for example, would be covered by such a capability. Such a signal, however, is part of an information service (*i.e.*, voice mail), and CALEA therefore does not require carriers to provide that signaling to law enforcement.[20]

The provision of the signaling information demanded by DOJ/FBI would also go beyond law enforcement's statutory authority under the ECPA. The ECPA permits pen registers and trap-and-trace devices to record only those impulses that identify telephone numbers. *See* 18 U.S.C. § 3127(3), (4). The signaling information demanded by DOJ/FBI would not identify any telephone numbers.

3. Delivery of call-identifying information on call data channel (pp. 47-49) and timely delivery of call-identifying information (pp. 49-52)

DOJ/FBI next demand two capabilities relating to *how* call-identifying information is provided to law enforcement. First, DOJ/FBI propose that all call-identifying information be provided to law enforcement through one call data channel ("CDC"), rather than through a combination of CDCs and call content channels ("CCCs") as set forth in the Interim Standard. Nothing in CALEA requires this capability. Section 103 states that carriers must

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[19] *See* Part I.A.2.b, *supra*. Moreover, even if "termination" referred to the end of a call, it would not encompass information about uncompleted calls, since such calls never begin, much less end.

[20] CALEA does allow law enforcement to intercept calls that are redirected from a person's telephone to a voice mail service. *See* H.R. Rep. No. 103-827, at 23, *reprinted in* 1994 U.S.C.C.A.N. at 3503. That is a different capability, however, from allowing law enforcement to access all signals sent between the service and the person.

ensure that their facilities allow the government to access call-identifying information. The Interim Standard fulfills that requirement and should not be revised. Indeed, section 103(b) states explicitly that law enforcement agencies are not authorized under CALEA to require any "specific design of equipment, facilities, services, features, or system configurations." 47 U.S.C. § 1002(b)(1)(A).

Moreover, the implementation of this capability would be needlessly expensive. As DOJ/FBI highlight, CALEA expressly contemplates the efficient implementation of its requirements. *See* DOJ/FBI Petition at 47-48 (citing 47 U.S.C. §§ 107(a)(1), 109). Contrary to the suggestion of DOJ/FBI, however, the Interim Standard provides for call-identifying information to be delivered over a combination of CDCs and CCCs precisely because that is most efficient solution. In contrast, preliminary cost estimates from manufacturers indicated that implementation of the capability sought by DOJ/FBI would be quite expensive. In any event, the burden should be on DOJ/FBI to demonstrate that the cost of implementing this (or any other) capability is reasonable. DOJ/FBI apparently have recently completed a 60-day exercise with manufacturers to develop more precise cost estimates for the punch list capabilities. DOJ/FBI reportedly have the results of that exercise; U S WEST does not.

DOJ/FBI also object to the Interim Standard because it does not specify the time within which carriers must deliver call-identifying information. DOJ/ FBI propose that such information be provided "contemporaneously with the communications to which it pertains or in a manner comparable to the speed with which other signaling messages are sent in the public network." DOJ/FBI Petition at 51. In addition, carriers would have to record call-identifying information using "time stamps" accurate to 100 milliseconds. *Id.* DOJ/FBI support this demand by pointing to CALEA's requirement that carriers provide call-identifying information

"before, during, or immediately after" a transmission so that it can be "associated with the communication to which it pertains." 47 U.S.C. § 1002(a)(2)(A), (B).

But carriers must provide call-identifying information only if it is "reasonably available." *Id.* § 1002(a)(2). Again, the preliminary cost estimates of manufacturers indicated that the instant delivery of call-identifying information demanded by DOJ/FBI could not be implemented at a reasonable cost. Unless DOJ/FBI can demonstrate with their new cost data that carriers could reasonably provide call-identifying information so quickly, the Commission should not include this capability in a revised standard.

4. Automated delivery of surveillance status information (pp. 52-57)

DOJ/FBI demand that carriers provide law enforcement with "automated delivery of surveillance status information." Within this category, their deficiency petition includes three specific capabilities, none of which involves the provision of either call content or call-identifying information, and none of which is required by CALEA.

Two of the capabilities requested by DOJ/FBI would require carriers to provide law enforcement with signals — a "continuity tone" and a "surveillance status message" — that would constantly inform law enforcement whether interceptions are working properly. *See* DOJ/FBI Petition at 54-55. But nothing in CALEA requires carriers to keep law enforcement agencies apprised in this way. Section 103 of CALEA provides that a carrier "shall ensure" that its equipment, facilities, and services are capable of intercepting communications and isolating call-identifying information. *See* 47 U.S.C. § 1002(a). Although this language may imply a duty to provide reliable electronic surveillance service, it does not suggest that law enforcement may

impose an additional and separate obligation on carriers to inform law enforcement constantly that each individual surveillance is in fact functioning.

The other "surveillance status" capability demanded by DOJ/FBI would obligate carriers to notify law enforcement whenever an intercept subject changes call features or services. *See* DOJ/FBI Petition at 56-57. Once again, DOJ/FBI overreach. CALEA requires carriers to ensure that their facilities permit the government to intercept the communications of subscribers and to access call-identifying information. Carriers fulfill that obligation when they install the basic surveillance capabilities required by section 103. Once they have done so, it is up to law enforcement agencies to request electronic surveillance assistance. Carriers are under a duty to provide the information necessary to accomplish the surveillance, *see* 18 U.S.C. § 2518(4), but that obligation derives from Title III, not CALEA. Accordingly, if law enforcement wants electronic notification of changes to a subject's telephone service, it can request such notification and pay for it under Title III. The cost of this capability would be high, because continuously monitoring a subject's phone service requires carriers to tie together and constantly query disparate network systems and databases. The high cost is all the more reason not to lump this capability under CALEA, which Congress did not intend as an all-purpose appropriation bill for law enforcement.

Moreover, law enforcement does not need this capability to maintain the status quo. The possibility that an intercept subject could add a line or otherwise change features has not changed significantly since the advent of digital telephony. And, even without this capability, law enforcement will still be able to obtain information about a subject's telephone features and services as it always has: through manual requests and responses under the ECPA

provision that allows telephone service records to be subpoenaed. *See* 18 U.S.C. § 2703(c)(1)(B), (C).

5. Standardization of delivery interface protocols (pp. 57-58)

Finally, DOJ/FBI propose to limit the number of interface protocols for the delivery of call content and call-identifying information. CALEA, however, requires carriers to deliver such data only "in a format" that allows law enforcement to transmit the information. 47 U.S.C. § 1002(a)(3). The statute does not limit the number of such formats. Law enforcement can, of course, always enter into negotiations with carriers and reimburse them for the costs of adopting a particular format or set of formats. CALEA's limited capabilities/reimbursement regime, however, does not impose such a requirement.

* * *

In short, the rules proposed by DOJ/FBI are fundamentally flawed from beginning to end. The Commission accordingly should include none of them in a revised standard.

B. Revising the Interim Standard To Include the Punch List Capabilities Would Be Inconsistent with the Public Interest Factors Enumerated in the Statute.

In deciding whether to modify a standard in response to a deficiency petition, the Commission not only must determine whether the new requested new capabilities fall within the scope of section 103. The Commission also must weigh the factors set forth in section 107(b) in considering whether — even if particular capabilities are covered by section 103 — the Commission should exclude them from a revised standard. A revised standard must:

(1) meet the assistance capability requirements of section 103 *by cost-effective methods*;

(2) protect the privacy and security of communications not authorized to be intercepted;

(3) *minimize the cost* of such compliance on residential ratepayers; [and]

(4) serve the policy of the United States to encourage the provision of new technologies and services to the public . . . .

47 U.S.C. § 1006(b)(1)-(4) (emphases added). As set forth below, DOJ/FBI give these factors the back of the hand, contending that none of them should affect the Commission's decision. However, the factors are an essential part of the statutory analysis. They reflect Congress's concern that law enforcement's asserted needs not override other important interests. And, in fact, each of the factors cuts strongly against including the punch list items in a revised standard.

The first and third factors are designed to protect carriers and ratepayers against goldplating by law enforcement.[21/] DOJ/FBI provide no evidence to support their perfunctory assertions that the punch list is cost-effective and imposes the least financial burden on ratepayers. *See* DOJ/FBI Petition at 59-61, 62-63. Instead, DOJ/FBI try to shift the burden of proof in these deficiency proceedings onto carriers. *See, e.g., id.* at 59, 62. It is DOJ/FBI, however, that challenge the Interim Standard as deficient, and it is their obligation to show why a safe harbor standard defined by accredited standard-setting organizations should be set aside. Moreover — and critically — DOJ/FBI is far better placed than carriers to know the cost of implementing the punch list capabilities they demand. If anyone knows what manufacturers' prices will be for CALEA-compliant equipment, it is the manufacturers themselves, not carriers. And, as noted above, DOJ/FBI have recently completed a 60-day exercise with manufacturers to develop reliable estimates of those costs. Carriers remain in the dark regarding the results of that

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21/ *See* note 2, *supra*.

exercise, but some earlier estimates were that the punch list capabilities could *double* the already substantial cost of implementing the Interim Standard.

Second, the punch list capabilities would not "protect the privacy and security of communications not authorized to be intercepted." 47 U.S.C. § 1006(b)(2). DOJ/FBI argue that those capabilities would "enhance" privacy protections, claiming that in a few narrow circumstances they would narrow the amount of information that law enforcement would need to collect during surveillance. *See* DOJ/FBI Petition at 61. DOJ/FBI, however, cannot see the forest for the trees. Whatever the potential privacy benefits of the punch list capabilities, the DOJ/FBI proposal *as a whole* expands law enforcement's access to private communications and correspondingly expands the threat to "privacy and security of communications not authorized to be intercepted."

Third, the DOJ/FBI proposal would not serve the policy of the United States "to encourage the provision of new technologies and services to the public." *See* 47 U.S.C. § 1006(b)(4). As discussed below in Parts II and III, DOJ/FBI want to make their proposed regulations — including the *technical requirements* for the punch list capabilities — the exclusive means for carriers to comply with section 103. However, forcing all carriers to comply with section 103 in an identical manner would stifle innovation and the development of new technology, particularly because the DOJ/FBI technical requirements are, as a technical matter, seriously flawed. Thus, the DOJ/FBI proposal would *discourage* "the provision of new technology and services to the public."

II. IN NO EVENT SHOULD THE COMMISSION PROPOSE A RULE THAT MAKES ANY PARTICULAR STANDARD THE MANDATORY, EXCLUSIVE MEANS OF COMPLYING WITH SECTION 103 OF CALEA.

If the Commission does modify the Interim Standard, it should in no event prescribe that compliance with that standard is the *exclusive* means of satisfying section 103. Compliance with section 103 is mandatory, but *how* carriers comply with section 103 is left to carriers to determine. CALEA specifically contemplates that any standard — whether adopted by either industry or the Commission — will be a voluntary one. If a carrier complies with an approved standard, the carrier is deemed to be in compliance with section 103. If the carrier opts for a different means of providing section 103 capabilities, it does not necessarily violate the requirements of the section; it simply cannot rely on the safe harbor of section 107(a)(2) and bears the risk that it will be subject to an enforcement action in which a court might find the carrier not to be in compliance.

The DOJ/FBI petition asks the Commission not only to promulgate a standard that includes the punch list capabilities and the Interim Standard, but also to make compliance with that standard *mandatory* for carrier compliance with section 103. *See* DOJ/FBI Petition, Appendix 1, at 4. According to the FBI's proposed Rule 64.1706, telecommunications carriers "shall ensure that their equipment, facilities, or services . . . provide the electronic surveillance assistance capabilities defined in the electronic surveillance interface standards set forth in Sections 64.1707 through 64.1708." *See id.* Those sections, in turn, include both the Interim Standard and the punch list capabilities as defined by DOJ/FBI.

The DOJ/FBI proposal asks the Commission to act beyond its statutory authority. Under CALEA, a carrier's ultimate responsibility is to comply with section 103, which provides

that a carrier "shall ensure" that its facilities can provide four general capabilities. Section 103 does not specify how a carrier must comply with the capability requirements. Indeed, a carrier must comply with section 103's capability requirements even if neither industry nor the Commission promulgates technical requirements or standards. *See* 47 U.S.C. § 1006(a)(3). And if a carrier does not comply with section 103, CALEA authorizes courts to issue an enforcement order against the carrier, *see id.* § 1007(a), and Title 18 authorizes civil penalties of up to $10,000 per day for violations of the order, *see* 18 U.S.C. § 2522.

Section 107 provides carriers with a safe harbor against such enforcement liability. Section 107(a)(2) states that a carrier "shall be found in compliance" with section 103 if the carrier complies with a standard adopted by an industry association or standard-setting organization. *See* 47 U.S.C. § 1006(a)(2). The statute thus allows a carrier to be sure that it will not face liability in future court proceedings if it follows an industry-sanctioned approach. What is more, section 107(a) permits any number of industry standards to be developed and thus enables carriers to find safe harbor, and achieve compliance, in a multitude of ways.

If a government agency or other person believes that an industry standard is deficient, section 107(b) allows the Commission to review and revise the standard so that it "meet[s] the assistance capability requirements of section 103." *Id.* § 1006(b)(1). Like an industry standard, a standard adopted or revised by the Commission provides carriers with a safe harbor. *See id.* § 1006(a)(2).

But nowhere does CALEA mandate compliance with a Commission standard. Rather, it merely puts carriers in a safe harbor *if* they comply with such a standard. Thus,

compliance with a Commission standard is *one* way — but not the *only* way — of complying with section 103.[22/]

CALEA gives carriers this discretion regarding how to comply with section 103 because one of the statute's fundamental aims is to promote compliance in a cost-effective manner and without stifling technological innovation. Section 107(b), for example, emphasizes that any standards issued by the Commission should minimize the cost of compliance and "serve the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 1006(b)(3), (4). CALEA requires the Commission to consider the same two factors when making a determination under section 109 of whether compliance is reasonably achievable. *Id.* § 1008(b)(1)(D), (G). Requiring all carriers to comply with section 103 exclusively in the single manner dictated by DOJ/FBI, by the Commission, or by other industry members would defeat that goal, stifling competition and the innovation that it brings. *See* H.R. Rep. No. 103-827, at 19, *reprinted in* 1994 U.S.C.C.A.N. at 3499. Indeed, the DOJ/FBI proposal would leave carriers with no room to find improved and more efficient means of complying with section 103 as technology and circumstances change.

Moreover, making compliance with a particular standard mandatory would allow DOJ/FBI to achieve through the back door what CALEA explicitly prohibits them from doing directly. Section 103(b) expressly states that law enforcement is not authorized under CALEA to

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22/ Even DOJ/FBI have recognized elsewhere that compliance with either an industry or Commission standard would be voluntary. *See* Comments Regarding the Commission's Authority to Extend the October 25, 1998 Compliance Date, *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, May 8, 1998, at 6 ("Use of this safe harbor method of compliance is purely voluntary — no carrier or manufacturer is required to implement the industry's safe harbor standards."); *id.* at 12 (stating that "Commission-set standards" would "defin[e] the parameters of the optional safe harbor method of compliance with § 103").

"require any specific design of equipment, facilities, services, features, or system configurations." *See* 47 U.S.C. § 1002(b)(1)(A). To adopt the DOJ/FBI technical requirements and to make compliance with them mandatory would, in effect, allow law enforcement to require a specific design of CALEA solutions.

III. IF THE COMMISSION REVISES THE INTERIM STANDARD, IT SHOULD DEFINE ANY NEW CAPABILITIES AT A GENERAL LEVEL AND LEAVE THE DEVELOPMENT OF TECHNICAL REQUIREMENTS TO THE APPROPRIATE STANDARD-SETTING ORGANIZATIONS.

The DOJ/FBI petition proposes regulations that not only would require the punch list capabilities but also would mandate that carriers implement those capabilities through specific technical requirements. It would be premature and imprudent, however, for the Commission to adopt specific technical requirements at this time. If the Commission revises the Interim Standard, it should remand the task of technical standardization to the appropriate standard-setting organizations.

As discussed above, the text of CALEA assigns primary responsibility for CALEA implementation to industry. Section 106 requires carriers and manufacturers to cooperate in achieving CALEA compliance, and section 107 deems carriers in compliance with section 103 if they comply with a standard adopted by an industry association or standard-setting organization. CALEA's legislative history also emphasizes this approach. The House report makes it quite clear that CALEA "establishes a mechanism for implementation of the capability requirements that defers, in the first instance, to industry standards organizations." H.R. Rep. No. 103-827, at 26, *reprinted in* 1994 U.S.C.C.A.N. at 3506. Thus, the statute allows "the telecommunications industry itself [to] decide how to implement law enforcement's requirements" and guarantees that "those whose competitive future depends on innovation will

have a key role in interpreting the legislated requirements and finding ways to meet them without impeding the deployment of new services." *Id.* at 19, *reprinted in* 1994 U.S.C.C.A.N. at 3499.

Section 107(b), of course, also authorizes the Commission to establish technical requirements if a party challenges an industry standard as deficient or if industry has failed to adopt necessary technical requirements. The Commission, however, should exercise this authority only as a last resort. As noted above, CALEA's text and legislative history express a clear congressional preference that industry have the first opportunity to develop technical requirements. Furthermore, the engineering expertise needed to develop technical requirements lies with the manufacturers and carriers, not with law enforcement agencies or the Commission. The Commission, therefore, should defer to industry initially on the adoption of technical requirements and should be reluctant to substitute its own technical requirements for those adopted by industry.

The standard-setting organizations here have not yet had a reason to develop technical requirements with respect to the capabilities on the punch list. The dispute among law enforcement agencies, industry, and privacy groups over the punch list has always turned on *what* capabilities CALEA requires, not on *how* carriers must provide those capabilities to fall in the safe harbor. Once the Commission decides what the safe harbor requires, it should leave any necessary technical implementation to the standard-setting organizations that have been working for the past three years to develop effective and efficient technical standards. If those organizations fail to issue technical standards or issue standards that the Commission finds do not adequately implement the required capabilities, *then* the Commission could appropriately use its authority to issue technical requirements and standards.

The danger of specifying technical requirements without going through the normal standard-setting process is underscored by the inadequacy of the technical requirements that DOJ/FBI have already proposed. As CTIA explains in its recent Response to Petition for Rulemaking, the DOJ/FBI technical requirements have been roundly criticized by industry experts as "inefficient, over-engineered, and technically inadequate." *See* CTIA Response at 8. Industry will continue in good faith to discuss these technical matters with law enforcement, but the Commission should be especially wary of writing such substantively flawed technical requirements into the Code of Federal Regulations.

In sum, the Commission should resolve the deficiency petitions by defining any additional capabilities in general terms and then give standard-setting organizations the latitude they need to implement the capabilities in an efficient and technically sound manner.

IV. DOJ/FBI PARTICIPATION IN ANY RULEMAKING SHOULD BE ON THE RECORD AND COMPLY WITH THE COMMISSION'S NORMAL EX PARTE RULES.

Section 107(b) does not grant DOJ or the FBI any special role or jurisdiction in determining the deficiency of an industry standard. Both agencies, in other words, stand in the same relation to the Commission on this matter as do CDT, carriers, manufacturers, and other interested parties. Thus, any participation by DOJ or the FBI in a rulemaking should be on the record and comply with the Commission's normal ex parte rules. *See* 47 C.F.R. § 1.1206(a)(1); 1.1204(a)(5). The public should be informed of any discussions between law enforcement and the Commission, and other parties should have an opportunity to respond to any arguments presented by law enforcement. The Commission should also make an immediate public statement that DOJ and the FBI will be held to the same procedural standards as all other interested parties.

CONCLUSION

For the foregoing reasons, the Commission should reject the punch list capabilities demanded by DOJ/FBI. If the Commission decides to revise the Interim Standard in any way, the Commission should not make the revised standard mandatory on carriers and should remand any technical standardization work to expert standard-setting organizations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Todd C. Zubler, hereby certify that, on this May 20, 1998, I have caused a copy of the foregoing "Comments of U S WEST, Inc." to be served by hand or by first class mail, postage prepaid, on each of the parties set forth on the attached service list.

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